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STATE OF MICHIGAN

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October 13, 2017

Ms. Sandra Moore
Crawford County Clerk
200 W. Michigan Ave.
Grayling, MI 49738

RE: Circuit Court File No. 17-10016-CE (M)

Dear Ms. Moore:

Enclosed for filing is an Opinion and Order and Proof of Service for same.

Should you have any questions, please don't hesitate to call me.

Sincerely,

Jennifer M. O'Rourke
Assignment Clerk and Judicial Assistant
46th Circuit Court
989-731-0224

Encl. Opinion and Order with Proof of Service

xc: Mr. Jeffrey Haynes, with copy of Opinion and Order
Mr. Joseph Hemming, with copy of Opinion and Order
Mr. Kyle Konwinsky, with copy of Opinion and Order
Mr. Matthew Zimmerman, with copy of Opinion and Order

STATE OF MICHIGAN
IN THE 46th CIRCUIT COURT
COUNTY OF CRAWFORD

Anglers of the Au Sable, Inc.,

Plaintiff,

v

Case No: 17-10016-CE (M)
Hon. George J. Mertz

Harrietta Hills Trout Farm, LLC,

Defendant.

OPINION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

The Defendant, Harrietta Hills Trout Farm, is asking this Court to grant it summary disposition and dismiss the Plaintiff's two count complaint which seeks injunctive and declaratory relief preventing or restricting the Defendant's operation of a trout farm on the East Branch of the Au Sable River near Grayling, Michigan.

FACTS

Plaintiff, Anglers of the Au Sable, is a non-profit organization dedicated to protecting and preserving the Au Sable River, and to promoting responsible use of the river by both public and private entities. The Defendant is a limited liability company based near Cadillac, Michigan that offers a wide range of aquatic services and is one of the largest private fish farms in Michigan, specializing in the production of a number of species of fish, including rainbow, brown, and brook trout.

The Au Sable River runs from Otsego County Michigan through the City of Grayling in Crawford County and eventually into Lake Huron. The East Branch of the Au Sable River flows from the northeast and joins the mainstream of the Au Sable just below downtown Grayling. The river's environment provides a self-sustaining trout population. The quality of the water supports various economic interests for the county including fishing, paddle sports, and high value riverfront property.

In 1914, the Grayling State Fish Hatchery was built. The Michigan Department of Natural Resources ("MDNR") operated the hatchery from 1925 to 1964. Subsequently, in 1995 the MDNR sold the hatchery to Crawford County. This sale was made pursuant to 1994 PA 321, which provided in pertinent part:

> (2) The conveyance . . . shall provide all of the following:
> (a) That the garage on the premises be used for a county health department facility or for the purposes described in subdivision (b).
> (b) That the balance of the property shall be used for public recreation or museum purposes or both . . .
>
> (3) The conveyance . . . also shall provide that upon termination of the uses described in subsection (2), or upon use for any other purpose, title to the property shall, at the option of the state, revert immediately to the state, with the state assuming no liability for any improvements made by Crawford County or by any other party.
>
> (4) The conveyance . . . shall provide for all of the following:
> (d) That Crawford County allows right of ingress and egress to the public for fishing purposes on the Au Sable river.

Crawford County then leased the hatchery to the Grayling Recreational Authority ("the Authority"). The Authority used the premises as a public park and a tourist fishing facility. During this time, the Authority grew less than 20,000 pounds of fish per year at the hatchery. In 2014, Crawford County leased part of the hatchery to the Defendant for a duration of 20 years.

The terms of the lease mirror those in 1994 PA 321, including the public recreation/museum and the public fishing requirements.

In 2014 the Defendant began operations at the hatchery, utilizing eight of the raceways to feed and grow less than 20,000 pounds of rainbow trout. Approximately 8.6 million gallons of water from the East Branch of the Au Sable River is diverted into the hatchery raceways daily. The design of the hatchery causes water from the river to flow through the raceways, where the fish are fed and where they excrete waste. As the water travels through the raceways it collects uneaten fish food and the fish excrement. Water containing certain levels of those substances eventually discharges directly back into the East Branch, which then joins the mainstream of the Au Sable a short distance downstream.

On July 1, 2014 the Department of Environmental Quality ("DEQ") issued Defendant a discharge permit under the federal Clean Water Act, 33 USC 1251 and Part 31 of the Michigan Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.3101. The permit under Part 31 of NREPA authorizes Defendant to discharge various substances into the river. If Defendant discharges phosphorus and fish feces at the permitted limits, it can discharge a maximum of about 1,600 pounds of phosphorus and about 160,000 pounds of fish feces into the river per year. The permit was not set to take effect until after Harrietta began growing more than 20,000 pounds of fish per year. In January 2016, Defendant notified the DEQ that it would be growing more than 20,000 pounds of fish per year and potentially up to 300,000 pounds of fish per year, triggering the allowances under the permit. The Plaintiff has challenged the issuance of the permit in a separate proceeding under NREPA and the Michigan Administrative Procedures Act, MCL 324.201. A contested case hearing concerning the permit concluded in April 2016,

and a proposal for decision was issued on February 1, 2017. The DEQ has not yet issued a final permit following the contested case hearing.

The Plaintiff has also filed the instant claims in this Court, alleging violations of 1994 PA 321 and the deed between the MDNR and Crawford County, as well as a claim under Part 17 of NREPA, MCL 324.1701 *et seq.* alleging pollution, impairment and destruction of the Au Sable River due to discharges from defendant's fish farm. The Defendant has moved for summary disposition of all of Plaintiff's claims under MCR 2.116(C)(8) and (10).

STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings, and only the pleadings are to be considered. *Corley v Detroit Bd of Ed*, 470 Mich. 274, 277 (2004). For the purposes of such a motion, a court must accept all well-pleaded factual allegations as true and view them in the light most favorable to the nonmoving party. *Maiden v Roswood*, 461 Mich. 109, 119 (1999). It is appropriate to grant such a motion only when the claim "is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery." *Kuhn v Secretary of State*, 228 Mich. App. 319, 324 (1998).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Maiden, supra* at120. Such a motion should be granted if there is no genuine issue of material fact and judgment can be issued as a matter of law. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich. App. 710, 712 (2007). The motion must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. MCR 2.116(G)(4). A motion made pursuant to MCR 2.116(C)(10) must be accompanied by affidavits, depositions, admissions or other documentary evidence in support of the grounds asserted. MCR 2.116(G)(3)(b). Only admissible documentary evidence may be

considered by the Court in evaluating and ruling upon a motion for summary disposition. MCR 2.116(G)(6).

When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4); *Maiden*, 461 Mich at 121. The Court must consider all evidence offered in the light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358 (1996).

ANALYSIS

I. PLAINTIFF'S CLAIMS FOR VIOLATION OF 1994 PA 321 AND THE DEED RESTRICTIONS

The first count in the Plaintiff's complaint alleges that the use of the hatchery property as a commercial fish farm violates the requirements of both the public act and the deed conveying the property to Crawford County. That count also alleges that the Defendant's use of the property in preventing or limiting public access and public fishing is a violation both of the public act and the deed. The Defendant argues that there is no violation of the public act or the deed, and in any case there is no private cause of action to enforce the public act and the Plaintiff lacks standing to enforce the deed restrictions.

A. Plaintiff's claim under 1994 PA 321

Plaintiff in its amended complaint alleges a violation of the statute, arguing public rights are being infringed upon. Specifically, the Plaintiff alleges that Defendant is violating the public use restriction by "(a) preventing public access to the Hatchery property except from May through September, (b) preventing public access to some of the raceways, and (c) preventing access to all portions of the Hatchery property between Labor Day and Memorial Day." The

Plaintiff also alleges that Defendant is violating the public fishing restriction of the statute "by erecting fences over the East Branch of the Au Sable River upstream and downstream of the raceways that prevent public access to the East Brach as it flows through the Hatchery property."

Under Michigan law if there is a legal cause of action a litigant has standing. *Lansing Sch. Ed. Ass'n v. Lansing Bd. of Ed.*, 487 Mich. 349, 372 (2010). Statutory standing exists if the Legislature "has accorded this injured plaintiff the right to sue the defendant to redress his injury." *Miller v. Allstate Ins. Co.*, 481 Mich. 601, 607 (2008). If there is no cause of action at law, a court should discretionarily determine whether a litigant has standing. *Id.* "A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Id.* However, "where a statute provides a comprehensive administrative or other enforcement mechanism or otherwise entrusts the responsibility for upholding the law to a public officer, a private right of action will not be inferred." *Garden City Educ. Ass'n v. School Dist. of City of Garden City*, 975 F.Supp. 2d 780, 786 (E.D. Mich. 2013) (citations omitted).

In this case there is no provision in the statute that specifically and expressly accords this Plaintiff the right to sue for a violation of the statute. The only language regarding enforceability in 1994 PA 321 grants to the State the ability to take specific action, not any private citizen or group. The Plaintiff argues that this remedy is not exclusive, as the statute does not have language limiting the remedy to the state, nor does it bar citizen enforcement. The Plaintiff argues that if the legislature wished to bar claims by citizens, it would have so provided. However, Plaintiff's request that this Court create a cause of action where none is expressly provided is in contravention of basic rules of statutory construction.

The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *Farrington v. Total Petroleum, Inc.*, 442 Mich. 201, 212 (1993). The first step in that determination is to review the language of the statute itself. *House Speaker v. State Administrative Bd.*, 441 Mich. 547, 561 (1993). If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible. *Lorencz v. Ford Motor Co.*, 439 Mich. 370, 376 (1992). In this case the statute is unambiguous and provides for an express remedy for any violation. The Court is not permitted to look beyond the language to determine whether there was an intent to provide for other remedies. Even assuming some interpretation were permissible or required, the Court finds that the doctrine of "expressio unius est exclusio alterius" or "inclusion by specific mention excludes what is not mentioned" would apply. *Hackel v. Macomb County Com'n*, 298 Mich. App. 311 (2012). In the absence of evidence of intent to the contrary, this Court will presume that in expressly providing for a specific remedy, the legislature was excluding other potential remedies or causes of action because they were not likewise included.

Because no statutory right is present, the Court must consider whether a private right of action may be inferred. The Plaintiff's claims are not for special injuries or special rights that the Plaintiff as an organization possesses; rather, its argument is based on *public* access and use. Further, the Plaintiff can state no special interest that would be detrimentally affected in a manner different than the public generally. There is nothing in the statutory scheme that would imply that the legislature meant to allow for any party other than the State to seek relief. More importantly, because the plain language of the statute provides for a specific enforcement mechanism that places the responsibility for upholding the law exclusively with the State, this Court cannot infer a private right of action for the Plaintiff. *Garden City Educ. Ass'n, supra.*

Plaintiff cites to *Collins v. Gerhardt*, 237 Mich 38 (1926) for the proposition that citizens can enforce the right to enjoy public resources. In that case a private landowner sought to maintain an action for trespass against a citizen who was fishing in public waters that ran through the landowner's property. The Court found that while the landowner may enjoy certain riparian rights to the land and streambed, the water was a public resource and the public had a right to the use of the water. This case is distinguishable because (1) Plaintiff is an organization, not a private individual, and (2) Plaintiff is seeking injunctive relief based on the violation of the use restrictions in the statute, not based on the rights of the public generally to use the river. (See Plaintiff's First Amended Complaint, Request for Relief, Paragraph A.). There is no authority on which this Court could infer a private right of action by an organization such as the Plaintiff to enforce the use restrictions in 1994 PA 321 through injunctive relief, and therefore the Defendant is entitled to summary disposition of this claim.

B. Plaintiff's claim based on the deed between the State and Crawford County

The Plaintiff argues in the alternative that it is a third-party beneficiary of the deed between the State and Crawford County, which contained the same use restrictions as 1994 PA 321, and therefore the Plaintiff has standing to enforce the restrictions. Under Michigan law, "[a] deed restriction represents a contract between the buyer and seller of the property." *Bloomfield Estates Improvement Ass'n Inc. v. City of Birmingham*, 479 Mich. 206, 212 (2007). As an initial matter "[a] party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breach (3) thereby resulting in *damages to the party claiming breach.*" *Pontiac Police & Fire Retiree Prefunded Group Health & Ins. Trust Bd. of Trustees v. Pontiac No. 2*, 309 Mich. App. 611, 623 (2015) citing *Miller Davis Co. v. Ahrens Const., Inc.*, 495 Mich. 161 (2014) (emphasis in original). A non-party to a

contract that is an intended third-party-beneficiary may sue for a breach of contract. *Schmalfeldt v. North Pointe Ins. Co.*, 469 Mich. 422, 429 (2003). "A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise directly to or for that person." *Id.* at 428 citing *Koenig v. South Haven*, 460 Mich. 667 (1999). Courts should use an objective standard to determine, from the form and meaning of the contract, whether a third-party beneficiary was intended. *Kammer Asphalt v. East China Twp.*, 443 Mich. 176, 189 (1993); *Brunsell v. City of Zeeland*, 467 Mich. 293, 298 (2002). Not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise. *Brunsell,* 467 Mich. at 296. Third-party beneficiaries may consist of a class of persons, as long as the class is "sufficiently described" or "reasonably defined" such that the class is "less than the entire universe, e.g. 'the public'". *Brunswell*, at 297; *Koenig*, at 680.

The deed the DNR granted to Crawford County on February 21, 1995 contains the exact language and restrictions set forth in 1994 PA 321. The Plaintiff was not a party to the deed and thus Plaintiff cannot sue to enforce the contract unless it can establish status as an intended third-party beneficiary. The language of the deed requires the property to be used for public recreation or museum purposes. It also requires that "[t]he County of Crawford will also allow the right of ingress and egress to the public for fishing purposes on the AuSable [sic] River." The question becomes whether this language created a class of persons that is "sufficiently described" or "reasonably defined", and also which is less than the "entire universe" or "the public". In *Koenig, supra*, the parents of a deceased child filed suit based on a Memorandum of Understanding ("MOU") between the City of South Haven and the Army Corps of Engineers in regards to operation of a pier where their daughter died. The court denied third-party beneficiary status to the parents because the MOU failed to specify any particular group the agreement was

intended to protect or benefit, such as anglers or swimmers. *Koenig*, at 681. If there had been such a designation it would have been clear the parties "were directly undertaking to benefit the particular class." *Id.* The court found that without such a designation, the intention to protect the public in general was too broad to allow for third-party standing.

In applying that standard to this case, this Court first notes that the Michigan Supreme Court in *Koenig* identified the potential danger in losing the distinction between direct and incidental beneficiaries. The Court noted that to do so creates a "disincentive to contract because of the fear of unanticipated third-party claims." *Id.* at 679. The Court directed that a cautious approach be taken to ensure that only where a promisor undertook an obligation to directly benefit a sufficiently described or designated class may a third-party beneficiary claim be maintained. In this case, the deed only mentions the "public". This designation is simply too broad to allow third-party standing for the Plaintiff. To find otherwise would result in the exact situation the *Koenig* Court warned against, as in essence it would create a class of third-party beneficiaries that would encompass any member of the "public" wishing to use the property. Although some specific uses are listed, for example establishing a museum and allowing "recreation" or "fishing", a specific intended group beyond the general public is not mentioned. The deed does not establish a defined or designated class of persons outside of the general public that Crawford County was undertaking a promise directly to or for.

Even if the Court were to find that the portion of the deed that provides that "The County of Crawford will also allow the right of ingress and egress to the public for fishing purposes on the AuSable River" creates a promise to directly benefit a described or designated class of beneficiaries, i.e. anglers or fishermen, the Court could still not grant the relief requested by the Plaintiff. As stated by the Plaintiff in its brief, "A third party beneficiary has the same remedies

as the promisee and stands in the shoes of the promisee." (Citations omitted). In this case, as also stated by the Plaintiff, the promisee is the State or MDNR. As with the statute, the deed provides that the remedy for a violation of the use restrictions "shall" result in reversion of the property to the State at the State's option. The Plaintiff would argue that reversion at the State's option is not the exclusive remedy. "Whether or not the remedy provided in the contract is exclusive depends upon the intention of the parties. If it appears to have been the intention that the remedy specified in the contract should be exclusive, the rights of the parties will be controlled thereby." *Short v. Hollingsworth*, 291 Mich. 271, 273-74 (1939). The language in the deed is plain and unambiguous. The use of the word "shall" as opposed to "may", as well as the lack of any language providing for other remedies, demonstrates that the only remedy contemplated by the State or Crawford County for a breach of the restrictions was reversion to the State at the State's option. Neither the State, nor by extension the Plaintiff, could seek injunctive or any type of relief other than that specified by the deed itself. Even assuming Plaintiff qualifies as a third-party beneficiary, the Plaintiff has failed to provide any authority on which this Court could grant the injunctive relief that it is requesting.

For the reasons cited above, this Court is compelled to find that the Plaintiff does not have a right of action or standing, either under 1994 PA 321 or as a third-party beneficiary, to seek injunctive relief for a violation of the statute or the deed restrictions. This Court's ruling makes moot the question of whether the activities engaged in by the Defendant on the property are actually a violation of the statute or the deed restrictions. Although it does not affect the Court's ultimate ruling, this Court nonetheless is compelled to address that issue as it sheds further light on the Court's view that the State is the only party with the ability to require adherence to the use restrictions.

This Court would find that there is no question of fact that the operation of a private commercial fish farm on the property clearly violates the statute and the deed restrictions. Reading those provisions together and looking at the transaction between the State and Crawford County as a whole, it is clear that the intent of the State in granting the property to the County was that it remain open to and used for the benefit of the general public for recreation, fishing, and historical purposes. There is no language in any of the documents that remotely suggests that either party contemplated that the property would be used for a private commercial enterprise of any kind. The fact that the November 12, 2012 MOU between the MDNR, the County, and the Defendant *says* the use is consistent does not make it so, when the plain and unambiguous language of the statute and the deed says otherwise. As the only party with the legal ability to enforce the use restrictions, the State is the party that has truly failed to insist on the preservation of this property for the benefit of the public by allowing a use that is in direct contravention of the express intent behind the original grant. The County and the Defendant are only doing what the State in essence has allowed them to do. However, for better or worse, that prerogative was reserved by the State in the statute and the deed, and the Court has no basis in law to circumvent the exercise of that prerogative in the context of a lawsuit between this Plaintiff and this Defendant.

II. PLAINTIFF'S CLAIMS UNDER THE MICHIGAN ENVIRONMENTAL PROTECTION ACT

The second count in Plaintiff's complaint alleges that the provisions of the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701, *et seq.* are being violated by the operation of Defendant's fish farm because the farm is and will continue to pollute and impair the Au Sable River. The Defendant argues that this claim should be dismissed because it has

received a discharge permit pursuant to Part 31 of NREPA and it is operating in compliance with the permit.

Michigan's Natural Resources and Environmental Protection Act ("NREPA") Part 31 governs the protection of water resources in this state. MCL 324.2010, *et seq*. Part 31 allows the DEQ to issue NPDES permits before a party may discharge pollutants into waterways. The section also requires the DEQ to ensure those permits comply with applicable federal laws and regulations. *Michigan Farm Bureau v. Dep't of Environmental Quality*, 292 Mich. App. 106, 111 (2011) citing *Sierra Club Mackinac Chapter v. Dep't of Environmental Quality*, 277 Mich. App. 531, 535-36 (2008). The DEQ has broad powers under Part 31 to regulate discharges into the State's waters, to set standards concerning pollutants, and to issue and ensure compliance with permits. *Michigan Farm Bureau*, 292 Mich. App. 106, at 132, see MCL 324.2101(1); MCL 324.3106; MCL 324.3112(1).

In the present case, the other pertinent section of NREPA is Part 17, known as MEPA, MCL 324.1701, *et seq*. This section allows a circuit court to grant "declaratory and equitable relief against any person for the protection of the air, water and other natural resources and the public trust in these resources from pollution, impairment, or destruction." *National Wildlife Federation v. Department of Environmental Quality (No. 2)*, 306 Mich. App. 369, 374 (2014). Other courts have noted that Part 17 is "expressly supplementary to other administrative and regulatory procedures provided by law." *Genesco, Inc. v. Michigan Department of Environmental Quality*, 250 Mich. App. 45, 49 (2002) citing MCL 324.1706. "In granting relief, if there is a standard for pollution or for an antipollution device or procedure, fixed by rule otherwise, by the state or an instrumentality, agency, or political subdivision of the state, then the court may determine the validity, applicability, and reasonableness of the standard." *Genesco*, at

49 citing MCL 324.1701(2). Further, "[t]he court has the power to direct the adoption of a standard approved and specified by the court if the court finds the standard to be deficient." *Genesco,* at 49 citing MCL 324.1701(2).

The Defendant argues that as applied in this case, Part 31 and Part 17 are in direct conflict, and that a finding that the Defendant is polluting the Au Sable under Part 17 despite compliance with a permit issued under Part 31 is not permissible. In reviewing NREPA as a whole, and Parts 17 and 31 in particular, this Court finds that the provisions of NREPA are intended to work together towards the goal of protecting the environmental and natural resources as noted in the preamble. It is a court's responsibility to "construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature." *Macomb Cnty Prosecutor v. Murphy*, 464 Mich. 149, 159 (2001). Part 31 of NREPA sets forth at MCL 324.3116 that:

> [T]his part does not repeal any law governing the pollution of lakes and streams, but shall be held and construed as ancillary to and supplementing the other laws and in addition to the laws now in force, except as a law may be in direct conflict with this part.

The language of the above section does not unequivocally state that Part 31 prohibits the enforcement of other sections or parts of NREPA. Further, it states that Part 31 prohibits the enforcement of another law only if it is in *direct* conflict with Part 31. These two provisions of NREPA are designed to operate as alternative means to protect water resources, and are not inherently, or by their own express terms, in conflict.

The Defendant cites *Genesco, supra*, for the proposition that Part 31 and Part 17 are in direct conflict, and that a claim under Part 17 cannot be used to challenge activity under Part 31. In *Genesco* the Michigan Court of Appeals addressed an alleged conflict between Part 17 and Part 201 of NREPA. The court held that both Parts had the common goal of protecting the environment, but that "the approach of Part 17 is to preserve the environment through the

obtaining of declaratory and injunctive relief in court, while Part 201 encourages the prompt cleanup of hazardous substances through administrative or private action and assignment of financial liability." *Genesco*, 250 Mich. App. at 49. The court found that the plaintiff's claim under Part 17 could not proceed because it constituted a preenforcement review of a response activity selected or approved by the MDEQ. The court first noted that the express terms of Part 201 prohibited judicial review of challenges to response activities that were approved by the MDEQ, except in limited circumstances. The court went on to find that reading the two parts together, it was clear that "claims under Part 17 may not be brought where the underlying controversy is over a 'response activity' as defined in Part 201. Otherwise, the MDEQ's efforts to clean up toxic sites might often be delayed by preenforcement litigation . . ." *Id.* at 53. The court held that the MDEQ must still comply with Part 17, but judicial review must be delayed until after the response activity under Part 201 is complete. *Id.* at 325.

Unlike in *Genesco*, in this case Part 31 does not contain an express provision limiting review of MDEQ actions as Part 201 did. Further, the *Genesco* court's ruling did not preclude an action under Part 17 nor did it find that Part 17 was in conflict with Part 201, it simply held that an action could not be brought under Part 17 for preenforcement review of MDEQ response activities until after they were completed because of the interest in timely initiation of remediation activities. This case does not involve preenforcement review of environmental cleanup or response activities, but rather a claim that the Defendant is polluting and will continue to pollute the Au Sable with discharges pursuant to a Part 31 permit. This Court finds nothing in *Genesco* that would preclude this claim by Plaintiffs, and in fact finds that case supports the notion that Part 31 and Part 17 are not in direct conflict.

This Court further looks to *Nemeth v. Abonmarche Dev., Inc.*, 457 Mich. 16 (1998), for guidance as to the interplay between Part 17 and other portions of NREPA. In *Nemeth*, the Michigan Supreme Court determined that the defendant's violation of the Soil Erosion and Sedimentation Control Act ("SESCA"), Part 91 of NREPA, could establish a prima facie case for a violation of MEPA Part 17. In looking at the interplay between Part 91 and Part 17, the court found that whether or not a party is in compliance with a permit issued pursuant to Part 91 is not dispositive of a claim under Part 17, and does not preclude judicial review under Part 17 of the pollution control standards underlying the permitting process. *Nemeth*, 457 Mich. at 30-32. The court recognized that although MEPA is supplementary to other administrative and regulatory procedures provided by law, MEPA "specifically authorizes a court to determine the validity, reasonableness, and applicability of any standard for pollution or pollution control '*and* to specify a *new* or *different* pollution control standard if the agency's standard falls short of the substantive requirements of MEPA.'" *Id.* at 30 (emphasis in original), citing *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332 (CA 6, 1989). The court went on to find that although a pollution control standard and permitting process was set by the legislature and the MDNR through Part 91 SESCA, "it is proper for the trial court to independently determine whether these pollution control standards are valid, applicable, and reasonable in accordance with the courts' development of the common law of environmental quality. If the court finds them deficient, it may direct the adoption of another pollution control standard that it so approves and specifies." *Id.* at 35. The court concluded that where a violation of a pollution control standard under Part 91 SESCA is proven it may establish a prima facie case under Part 17 MEPA. The logical extension of that ruling is that a violation of SESCA does not then, in and of itself, establish a violation of MEPA.

In this case, the Part 31 allows the DEQ to adopt standards for the approval of point source discharge permits. The *Nemeth* decision makes it clear that a circuit court has the power under Part 17 to review the standards the set by the DEQ and determine whether they are reasonable in accordance with the common law of environmental quality. Therefore, whether or not the Defendant is in compliance with the Part 31 permit is relevant, and a factor in a determination of whether a claim exists under Part 17, but it is not dispositive. Because this Court has the ability to review pollution control standards set by the DEQ and to find them deficient, this Court can likewise find that Plaintiff has established a claim for a violation of Part 17 regardless of whether the DEQ has issued a permit or whether the Defendant has complied with it. As in *Nemeth*, a failure by the Defendant to comply with the permit may, but does not necessarily establish a violation of Part 17. By the same token compliance with a permit by the Defendant may, but does not necessarily establish compliance with Part 17. Either way the existence of or compliance with a permit under Part 31 does not preclude the Plaintiff from stating a claim under Part 17 as a matter of law.

Finally, the Defendant argues that the Legislature has unequivocally given the DEQ the authority to regulate specific point source dischargers under Part 31, relying on *City of Brighton v. Hamburg Twp.*, 260 Mich. App. 345 (2004). In that case, the conflict at issue was between an ordinance put in place by Hamburg Township and a discharge allowance granted by MDEQ under NREPA. The court found that the comprehensive scheme set forth in Part 31 "occupies the field", leaving no room for individual local governments to legislate their own environmental regulations. *Id.* at 350. The court held that to do so would allow a patchwork of regulations statewide and noted that the subject matter of water quality required exclusive state regulation in order to achieve uniformity. *Id.* However, the *Hamburg Twp.* case does not stand for the

proposition that a permit issued under Part 31 precludes claims under Part 17. It merely stands for the proposition that local governments cannot enact ordinances that conflict with NREPA and attempt to establish local standards to govern the issuance of discharge permits. The ruling does not inhibit this Court's ability under Part 17 to determine whether, permit or not, pollution is occurring.

This Court finds that Plaintiff's claim under Part 17 is not precluded as a matter of law based on the existence of or compliance with a permit under Part 31. Further, the Court finds that there is no direct conflict between the operation of Part 31 and a claim for pollution under Part 17 that would preclude the Plaintiff's claim in this case. The Defendant is not entitled to summary disposition and the Plaintiff's claim will proceed.

CONCLUSION

For the reasons stated above, the Defendant's motion for summary disposition on Count I of Plaintiff's first amended complaint is **GRANTED** pursuant to MCR 2.116(C)(8). The Defendant's motion for summary disposition on Count II of Plaintiff's first amended complaint is **DENIED**. It is so ordered.

Date: 10-13-17

HONORABLE GEORGE J. MERTZ
46th Circuit Court

PROOF OF SERVICE

I certify that copies of this Opinion and Order were mailed to the parties and/or their attorneys by first class mail this date.

Date mailed: 10-13-2017

Clerk